

1987

Robert C. Large v. Howard Trucking of Utah Inc. : Brief of Appellant

Utah Court of Appeals

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Burton K. Brasher; Workers Compensation Fund.

Jack C. Helgesen; Helgesen & Waterfall.

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DOCKET NO. **870437-CA**

IN THE UTAH COURT OF APPEALS

ROBERT C. LARGE, :

Applicant/Appellant, : Case No. 870437-CA

vs. :

HOWARD TRUCKING OF UTAH : Priority Classification
INC., and/or STATE : No. 6
INSURANCE FUND and :
THE SECOND INJURY FUND,

Defendants/Respondent. :

BRIEF OF THE APPELLANT

Appeal from the Industrial Commission of Utah
Administrative Law Judge Richard G. Sumsion

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COURT OF APPEALS

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TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT SHOWING JURISDICTION OF COURT OF.....	1
APPEALS	
II. STATEMENT SHOWING NATURE OF THE PROCEEDINGS.....	1
III. STATEMENT OF ISSUES PRESENTED ON APPEAL.....	2
IV. DETERMINATIVE CONSTITUTIONAL PROVISIONS,.....	2
STATUTES AND ORDINANCES	
V. STATEMENT OF THE CASE.....	3
A. NATURE OF THE CASE.....	3
B. COURSE OF PROCEEDINGS.....	3
C. DISPOSITION AT ADMINISTRATIVE AGENCY.....	4
D. RELEVANT FACTS.....	5
E. OTHER RELEVANT FACTS.....	6
VI. SUMMARY OF THE ARGUMENT.....	7
V. ARGUMENT.....	8
<u>POINT ONE:</u>	8
THE ISSUE AS TO WHETHER ROBERT LARGE WAS AN EMPLOYEE EVEN THOUGH HE WAS INJURED DURING A TRY-OUT PERIOD, WAS ALREADY DECIDED, ENTERED, AND FINALIZED ON SEPTEMBER 18, 1986.	
<u>POINT TWO:</u>	10
IT IS INCONSISTENT FOR THE ADMINISTRATIVE LAW JUDGE AND INDUSTRIAL COMMISSION TO INCLUDE APPELLANT AS AN EMPLOYEE FOR PERMANENT PARTIAL DISABILITY BENEFITS, TEMPORARY TOTAL DISABILITY BENEFITS AND MEDICAL EXPENSES, BUT EXCLUDE HIM AS AN EMPLOYEE FOR PERMANENT TOTAL DISABILITY BENEFITS.	
<u>POINT THREE:</u>	12
THE ADMINISTRATIVE LAW JUDGE'S ARGUMENT THAT THE INDUSTRIAL INJURY IS NOT THE PROXIMATE CAUSE OF APPELLANT'S PERMANENT TOTAL DISABILITY IS UNNECESSARY AND MISLEADING.	

POINT FOUR:.....	14
THE APPROPRIATE TEST IS NOT WHETHER THE INJURY WAS THE "PROXIMATE CAUSE" OF APPELLANT'S DISABILITY, BUT WHETHER THE INJURY "AGGRAVATED" HIS PRE-EXISTING PROBLEMS.	
POINT FIVE:.....	15
A DETERMINATION OF PERMANENT TOTAL DISABILITY MUST FOCUS ON APPELLANT'S LOSS OF WAGE EARNING CAPACITY.	
POINT SIX:.....	18
APPELLANT PRESENTED A PRIMA FACIE CASE OF PERMANENT TOTAL DISABILITY TO THE COMMISSION.	
VIII. CONCLUSION.....	19
ADDENDUM	

TABLE OF AUTHORITIES

CASES CITED	<u>Page</u>
<u>Bennion v. LeGrand Johnson Construction Co.,.....</u>	12
701 P.2d 1078 (Utah 1985)	
<u>Hardman v. Salt Lake City Fleet Management,.....</u>	16,18
725 P.2d 1323 (Utah 1986)	
<u>Marshall v. Industrial Commission Of Utah,.....</u>	13,18
681 P.2d 208 (Utah 1984)	
<u>Northwest Carriers v. Industrial Commission, Etc.,...</u>	16
639 P.2d 138 (Utah 1981)	
<u>Norton v. Industrial Commission of Utah,.....</u>	16,17
728 P.2d 1025 (Utah 1986)	

STATUTES CITED	
Utah Code Annotated, Section 35-1-16.....	10
Utah Code Annotated, Section 35-1-45.....	9
Utah Code Annotated, Section 35-1-67.....	12,13
Utah Code Annotated, Section 35-1-69.....	2,13,14
Utah Code Annotated, Section 35-1-82.53.....	10
Utah Code Annotated, Section 35-1-82.55.....	10
Utah Code Annotated, Section 35-1-83.....	10

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BRIEF OF THE APPELLANT

Appeal from the Industrial Commission of Utah
Administrative Law Judge Richard G. Sumsion

I. STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

The Statutory authority granting jurisdiction to the Utah Court of Appeals is Utah Code Annotated Section 78-2a-3(a). Also, the former Utah Code Annotated Section 35-1-83 (repealed) and the current Utah Code Annotated Section 25-1-86 confer authority and jurisdiction on the Utah Court of Appeals.

II. STATEMENT SHOWING NATURE OF THE PROCEEDINGS. These proceedings are brought to review a Worker's Compensation award entered on July 28, 1987, by Administrative Law Judge, Richard G. Sumsion, of the Industrial Commission of Utah. Appellant specifically appeals the July 28, 1987, Order denying a permanent total disability award.

III. STATEMENT OF ISSUES PRESENTED ON APPEAL. The Appellant raises the following issues on appeal:

1. Can a person be an "employee" for purposes of temporary total disability compensation, permanent partial disability compensation, and medical expense compensation, but not for permanent total disability compensation?

2. Must the industrial injury be the "primary cause" of Appellant's permanent total disability in cases where the industrial injury aggravated pre-existing impairment as defined in Utah Code Annotated Section 35-1-69?

3. Is an award for permanent total disability based on an employee's wage earning capacity?

4. Did Appellant present a prima facie case of tentative permanent total disability?

IV. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Utah Code Annotated, Section 35-1-16 (1)(b) - Powers and duties of commission/fees.

Utah Code Annotated, Section 35-1-45 - Compensation for industrial accidents to be paid.

Utah Code Annotated, Section 35-1-67 - Permanent total disability - Amount of payments - Vocational Rehabilitation - Procedure and payments.

Utah Code Annotated, Section 35-1-69 - Combined injuries resulting in permanent Incapacity - Payment out of Second Injury Fund - Training of employees.

Utah Code Annotated, Section 35-1-82.53 - (Effective through December 31, 1987). Review of order of administrative law judge or commission - Effect of supplemental order of administrative law judge.

Utah Code Annotated, Section 35-1-82.55 - (Effective through December 31, 1987). Motion for review - Writing required - Filing.

Utah Code Annotated, Section 35-1-83 - (Effective through December 31, 1987). Review by Court of Appeals.

V. STATEMENT OF THE CASE.

A. Nature of the Case. The Appellant claims that the July 23, 1987, Order denying Appellant's claim for permanent total disability under Worker's Compensation was contrary to law.

B. Course of Proceedings. These proceedings began when Robert C. Large filed an Application for Hearing with the Industrial Commission of Utah on August 30, 1985, wherein he claimed permanent partial disability, temporary total disability, and medical benefits. The claim was heard before the Administrative Law Judge Richard G. Sumsion on April 22, 1986, and during the hearing, Judge Sumsion allowed the claim to be amended alleging permanent total disability. The main issue at the time of the hearing was whether Robert Large was entitled to Worker's Compensation Benefits since he was injured during a try-out period while performing a mandatory test drive as a prerequisite to employment with Howard Trucking of Utah, Inc. On September 3, 1986, Judge Sumsion found and ordered

that Robert Large was in fact entitled to Worker's Compensation benefits and awarded him temporary total disability compensation and medical expenses, but reserved the issues of permanent partial and permanent total disability until a later determination. None of the parties sought review or appeal of the September 3, 1986, Order, and it became final on September 18, 1986.

On April 17, 1987, Plaintiff requested a hearing for a permanent total disability determination. On July 28, 1987, Judge Sumsion sent his Supplemental Findings of Fact, Conclusions of Law, and Order wherein he stated the hearing for permanent total disability was unnecessary and denied permanent total disability and ordered a 10% permanent partial disability award.

Plaintiff requested review by the Industrial Commission of Judge Sumsion's July 28, 1987, Order, and the Motion for Review of Order was denied on September 9, 1987. Mr. Large now appeals the July 28, 1987, Order.

C. Disposition at Administrative Agency. The Administrative Law Judge ruled that Robert Large was not entitled to permanent total disability on the premises that 1) he was "in fact a non-employee", and 2) that the accident was not the proximate cause of Plaintiff's permanent total disability.

The Industrial Commission denied Plaintiff's Motion for Review.

D. Relevant Facts. In mid-March 1985, Appellant called Defendant Howard Trucking to apply for a position as a semi-truck driver. He was told that he was welcome to apply but that they did no hiring over the phone. He was asked to apply in person and to bring a current chauffeur's license and current medical clearance. Appellant discussed the fact that he was a very large man with Mr. Howard of Howard Trucking to determine if this would disqualify him from obtaining a position. He was told that his good driving record was of far more importance than his physical size. (Findings of Fact, Conclusions of Law, and Order of September 3, 1986, Pg. 2).

On March 25, 1985, Appellant presented himself at Howard Trucking with a current physical clearance from a qualified physician in order to be tested for the position. Part of the application for employment involved taking a driver's test in a truck similar to the one that he might be driving. Such a test is required by ICC regulations and is administered by the employer. (Findings of Fact, Conclusions of Law, and Order, Pg. 2). After beginning the driving test, he was instructed to climb out of the truck, at which time his foot slipped and he fell approximately four and a half feet to the ground, injuring his back. (Findings of Fact, Conclusions of Law, and Order, Pg. 3).

E. Other Relevant Facts. Appellant had been a truck driver for approximately 40 years prior to the industrial accident (Findings of Fact, Conclusions of Law and Order, September 3, 1986, Pg. 2).

He last worked as a truck driver in September 1982, and from that time until the industrial accident of March 25, 1985, he was involved in self-employment activities. (Findings of Fact, Conclusions of Law, and Order, September 3, 1986, Pg. 2).

Counsel for Appellant submitted a memorandum of law supporting the proposition that Worker's Compensation coverage should be extended to one injured during try-out period, and Judge agreed with rationale submitted. (Findings of Fact, Conclusions of Law, and Order, Pg. 3).

During the 10 years prior to the hearing date Appellant's average weight had been 325. (Transcript of Hearing, April 22, 1986, Pg. 42).

Appellant had a pre-existing back condition at the time of his injury on March 25, 1985, as described by Judge Summison:

"Dr. Barbosa assigned the applicant a 10% permanent physical impairment rating with 5% being attributed to the applicant's accident of March 25, 1985, and the remaining 5% being attributable to his previous lumbar surgery performed in 1953." (Supplemental Findings of Fact, Conclusions of Law, and Order, July 28, 1987, Pg. 2).

Appellant had a limited educational background. (Supplemental Findings of Fact, Conclusions of Law, and Order, July 28, 1987, Pg. 1).

Appellant was 61 years of age at the time of his injury on March 25, 1985. (Findings of Fact, Conclusions of Law and Order, September 3, 1986, Pg. 2).

VI. SUMMARY OF THE ARGUMENT.

Judge Sumsion's two principle reasons for denying Robert Large permanent total disability are 1) that he is really a "non-employee", for total disability purposes and so far as he knows, "an award of permanent total disability to one who is technically a non-employee is unprecedented in this state or in any other jurisdiction," and 2) that the "proximate cause(s)" of his disability are his age, lack of education, lack of transferable skills and pre-existing physical conditions.

Judge Sumsion ruled on September 3, 1986, that Robert Large's injury was a work-related injury covered under the Utah Workers Compensation Act, and ordered medical and temporary total disability benefits. Implicit in that Order was the finding that Robert Large was an "employee" for purposes of compensation. That Order became final and non-appealable on September 18, 1986.

A worker cannot be an employee for purposes of medical expense benefits and temporary total disability

compensation, and yet not be an employee for purposes of permanent total disability benefits.

The industrial injury was the direct and immediate cause of the permanent total disability Appellant now suffers. Furthermore, the injuries which he sustained aggravated his pre-existing condition and left with him with a disability which was substantially greater than he had, had he not sustained the injury of March 25, 1985. A decision and award for permanent total disability must be based on a plethora of facts, only one of which must be physical impairment. The Commission is obligated to consider Mr. Large's disability and must consider all factors leading to that disability.

Appellant is entitled to permanent total disability benefits insured under the Worker's Compensation Laws because he fills all statutory requirements for permanent and total disability. The Administrative Law Judge's Order is inconsistent with his own findings.

VII. ARGUMENT.

POINT ONE: THE ISSUE AS TO WHETHER ROBERT LARGE WAS AN EMPLOYEE, EVEN THOUGH HE WAS INJURED DURING A TRY-OUT PERIOD, WAS ALREADY DECIDED, ENTERED, AND FINALIZED ON SEPTEMBER 18, 1986.

At the beginning of the Worker's Compensation hearing held before Judge Richard G. Sumsion on April 22, 1986, Judge Sumsion stated:

"It appears from a review of the file that the primary issue involved in this case is to determine whether or not the Appellant is entitled to the status of an employee inasmuch as he was injured by undergoing a test as a pre-employment requirement for the job; and if we get over that problem, then I assume there will be additional medical issues as well." (Transcript of Hearing, April 22, 1986, Pg. 3, lines 10-16).

In his following Findings of Fact, Conclusions of Law, and Order of September 3, 1986, Judge Sumsion "got over that problem" and awarded Appellant temporary total compensation and medical benefits compensation.

Utah Code Annotated, Section 35-1-45, states in its pertinent parts:

"Every employee...who is injured...by accident arising out of or in the course of his employment...shall be paid compensation for loss sustained on account of the injury..."

Judge Sumsion's order awarding Robert Large compensation for his injuries includes an implied finding that he was an "employee", within the meaning of the statute, with all the rights of someone who is injured by accident arising out of or in the course of his accident.

Page 6 of the September 3, 1986, Order states:

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

This Order is in compliance with Utah Code Annotated Section 35-1-82.53, Section 35-1-82.55, and 35-1-83, all effective until January 1, 1988, which deny appellate review unless a timely Motion for Review of the Order is made. No Motion for Review or Objection was ever filed regarding this Order and therefore it became final on September 18, 1986.

Appellant contends that the Administrative Law Judge's denial of permanent total disability benefits is inconsistent with the prior Order. A renewed discussion of "whether or not the Appellant is entitled to the status of an employee" for purposes of permanent total disability benefits (from the Supplemental Findings of Fact, Conclusions of Law and Order of July 28, 1987) is inappropriate.

POINT TWO: IT IS INCONSISTENT FOR THE ADMINISTRATIVE LAW JUDGE AND INDUSTRIAL COMMISSION TO INCLUDE APPELLANT AS AN EMPLOYEE FOR PERMANENT PARTIAL DISABILITY BENEFITS, TEMPORARY TOTAL DISABILITY BENEFITS AND MEDICAL EXPENSES, BUT EXCLUDE HIM AS AN EMPLOYEE FOR PERMANENT TOTAL DISABILITY BENEFITS.

Utah Code Annotated, Section 35-1-16(1)(b) Powers and duties of Commission - Fees, states the following:

It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority:

b) to ascertain and fix reasonable standards, and prescribe, modify, and enforce reasonable orders, for the adoption of safety devices, safeguards, and other means or methods of protection, to be as nearly uniform as possible, as necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety, and welfare of employees in employment and places of employment; [underline added].

In Judge Sumsion's Findings of Fact, Conclusions of Law, and Order of September 3, 1986, he agreed with the rationale presented by Appellant at the hearing, that the scope of one's employment can be extended to those injured in a try-out period. The Judge interpreted the Worker's Compensation Laws as they were meant to be: liberally and in favor of the applicant. The purpose is to protect injured employees from bearing the responsibility of paying for injuries that were work related. In entering his September 3, 1986, Order, the Administrative Law Judge prescribed a fair and reasonable standard and awarded the employee total temporary disability compensation, and medical benefits. The Administrative Law Judge later also awarded the employee permanent partial disability benefits. However, when the Administrative Law Judge and the Commission disallowed Appellant's claim for permanent total disability by arguing that he was in fact a "non-employee", their orders were not uniform and consistent with the previous decision and do not conform with the Judge's initial findings. Judge Sumsion himself calls his denial

"inconsistent" and is clearly troubled by its inconsistency.

Appellant asserts that it is the duty of the Commission to ascertain and fix certain standards and must carry out and uphold those standards. To apply different standards is inconsistent and "paradoxical".

POINT THREE: THE ADMINISTRATIVE LAW JUDGE'S ARGUMENT THAT THE INDUSTRIAL INJURY IS NOT THE PROXIMATE CAUSE OF APPELLANT'S PERMANENT TOTAL DISABILITY IS UNNECESSARY AND MISLEADING.

Judge Sumsion's Conclusion in his Supplemental Order of July 28, 1987, is that the proximate or dominant cause of the Appellant's present unemployability is not the industrial accident. He argues that "the causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be the nearer in time to the result."

Proximate cause means nothing more than the legal cause after consideration of all the relevant circumstances. Bennion v. LeGrand Johnson Construction C., 701 P.2d 1078 (Utah 1985). In the Worker's Compensation context, the legal cause is dictated by statute and by caselaw interpreting the statute.

Proximate or dominant cause is not a criteria established in the statute required in awarding permanent total disability. Utah Code Annotated Section 35-1-67

simply reads, "In cases of permanent total disability." At no point does the statute mention or describe the need for the industrial injury to be the dominant cause of the permanent total disability. This argument was already attempted but reversed by the Supreme Court in Marshall v. Ind. Comm. of Utah, 681 P.2d 203 (Utah 1984), wherein the Administrative Law Judge denied claim for permanent total disability because, 'it appears to the Administrative Law Judge that [the appellant's] prime reason for being unemployed at the present time is age rather than physical impairment.'

There are no "prime factor or reason" or "proximate cause" requirements in Utah Code Annotated Section 35-1-67.

Judge Sumsion confronted the issue of Mr. Large's pre-existing problems; he states, "But for his pre-existing back condition, his obesity and his advanced years, it is highly unlikely he would have sustained any significant injury as result of the incident described." The Judge was struggling with the concept of "substantially greater" disability which is defined and discussed in Utah Code Annotated, Section 35-1-69. However, this statute clearly allows for compensation on the basis of two tests 1) "permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or" 2) an injury "which aggravates or is aggravated by such pre-existing incapacity... ."

POINT FOUR: THE APPROPRIATE TEST IS NOT WHETHER THE INJURY WAS THE "PROXIMATE CAUSE" OF APPELLANT'S DISABILITY, BUT WHETHER THE INJURY "AGGRAVATED" HIS PRE-EXISTING PROBLEMS.

Robert Large, like many applicants for Worker's Compensation benefits, suffered from pre-existing problems. The issue is: to what extent do the pre-existing problems and the industrial injury contribute to the disability? In other words, what caused the new disability? Judge Sumsion approached the issue by discussing "proximate cause."

The statute avoids the test of "proximate cause" by providing simply that:

If any employee who has previously incurred a permanent incapacity by accidental injury, disease or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation...shall be awarded on the basis of the combined injuries. ...

Utah Code Ann. Section 35-1-69(1).

The code further states that a disability which results from "any aggravation of the pre-existing injury shall be deemed "substantially greater." Utah Code Annotated Section 35-1-69(1).

In the Findings of Fact, Conclusions of Law, and Order of September 3, 1986, the Judge acknowledged that the medical records substantiated an aggravation:

"The various medical reports are highly suggestive of some residual impairment from the applicant's industrial accident and they clearly

indicate extensive pre-existing impairment from prior back problems. The applicant underwent a three level laminectomy in 1953, and the current evidence of arthrosis and advance facet arthritis throughout the lumbar segment are probably attributable to his old injury and the deterioration which would be expected to result therefrom. No definitive information is available as to the possibility of permanent impairment resulting from the industrial accident but Dr. Barbosa is of the opinion that **the accident did aggravate the pre-existing condition** and he believes some residual impairment did result." (Findings of Fact, Conclusions of Law and Order, Pg. 4).

Judge Sumsion found that the Appellant did sustain a 10% physical impairment, of which 5% is attributed to the Appellant's accident of March 25, 1985, and the remaining 5% being attributable to his pre-existing condition. (Supplemental Findings of Fact, Conclusions of Law, and Order, Pg. 7). Therefore, the rationale that the industrial injury contributed "relatively little" or in other words did not leave Appellant with a substantially greater injury, is inappropriate. Because the industrial injury **aggravated** his pre-existing problems, the statute **deems** the disability substantially greater.

POINT FIVE: A DETERMINATION OF PERMANENT TOTAL DISABILITY MUST FOCUS ON APPELLANT'S LOSS OF WAGE EARNING CAPACITY.

Once an injury is found to be compensable, the amount of recovery is governed by statute and case law. The injury which Mr. Large sustained has been found to be compensable. The next issue in the chain of permanent total disability determination is Mr. Large's present and

future ability to engage in gainful activity as it is effected by such diverse factors as age, sex, education, economic and social environment, in addition to the definite medical factor - permanent impairment.' Norton v. Industrial Commission, 728 P.2d 1025, (Utah 1986).

"Disability in terms of worker's compensation is the worker's impairment of earning capacity." Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986); Northwest Carrier v. Industrial. Comm., Etc., 639 P.2d 138, (Utah 1981).

A worker may be found permanently totally disabled if, by reason of the impairment from his injury, along with other factors, he cannot earn a substantial living on his own capabilities. Hardman, supra.

Appellant had a work related injury, and the Administrative Law Judge concedes that the Appellant falls into the "odd-lot category" of injured workers who are **unemployable** because of limited educational background and age. (Supplemental Findings of Fact, Conclusions of Law, and Order, Pg. 1 and Pg.7). He also found that the industrial accident was the "immediate cause" of the applicant's back pain. (Supplemental Findings of Fact, Conclusions of Law, and Order, Pg. 6) The Administrative Law Judge also adopted the physician's report giving Mr. Large a 10% disability rating; 5% pre-existing and 5% due to the industrial accident. (Supplemental Findings of Fact,

Conclusions of Law, and Order, Pg. 7) Also, Mr. Large was obese and 61 years old at the time of the injury.

In judging whether Mr. Large was entitled to permanent total disability, the Administrative Law Judge first had to find that the injury was work-related, (which, based on his first Order, it was), and then had to consider all relevant facts as to Mr. Large's abilities to earn a living. In Norton the Court found,

In assessing the lack of earning capacity, a constellation of factors must be considered, only one of which is physical impairment. Other factors are age, education, training and mental capacities.

The Court in Norton reversed the Industrial Commission's order due to the fact that there was no consideration or mention of Norton's "eligibility for rehabilitation."

Mr. Large's chances for rehabilitation were never addressed, and the Judge "acknowledges that the applicant most likely is unemployable due to a combination of factors ..." (Order Denying Motion for Review, Pg. 1) His future earnings cannot be dependant upon his own capabilities.

Appellant admits that his obesity and age play an extended role in his total disability. Nevertheless, Appellant also contends that the industrial injury of March 25, 1985, played the greater role in leading to his permanent and total disability. Mr. Large testified at the hearing that he was 62 years old and weighed approximately 376 pounds at the time of the injury. His average weight had been nearly the same for at least the 10 years prior to

the injury. Mr. Large's testimony also included the fact that he had been a truck driver for approximately 40 years prior to March 25, 1985. Therefore, at least 10 years prior to the industrial injury, Mr. Large had been able to work competently despite his weight and previous back surgery and conditions from 1953. The industrial injury of March 25, 1985, took the last of his capabilities away and finally left him permanently and totally incapable of earning a wage.

Mr. Large asserts that he "cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities' may learn to do." (Marshall, see supra).

POINT SIX: APPELLANT PRESENTED A PRIMA FACIE CASE OF PERMANENT TOTAL DISABILITY TO THE COMMISSION.

From the initial hearing Judge Sumsion found that the Appellant was 62 years old, had relied on himself for the last 40 years to earn a living, that he had been rated as having a 10% whole man disability (Supplemental Findings of Fact, Conclusions of Law, and Order, Pg. 2), and had a limited educational background (Supplemental Findings of Fact, Conclusions of Law, and Order, pg. 1). By offering these facts into evidence, the Appellant presented a prima facie case of tentative permanent total disability. In Hardman, the employee presented similar facts and the Supreme Court of Utah found he had established a prima

facie case of tentative permanent total disability before the Industrial Commission.

Based on the fact that Appellant proved a case of tentative permanent total disability along with the finding by Judge Sumsion that he is clearly within the "odd lot" class of workers, Appellant asserts he is entitled to permanent total disability as provided by the Worker's Compensation statutes.

VIII. CONCLUSION

Appellant is entitled to permanent total disability and should be awarded such. He has met all statutory requirements and case law supports the issues presented on this appeal.

Appellant sustained a work-related injury for which he received temporary total compensation, permanent partial disability and medical benefits. He sustained a physical impairment through an injury which aggravated his pre-existing medical problems, which combined with his pre-existing condition, his age, limited work and educational experience, has left him with a substantially greater disability which completely prevents him from earning a reasonable income.


The Administrative Law Judge and Commission's ruling that Appellant was in fact a "non-employee" and that the injury of March 25, 1985 was not the "proximate" or

"dominant cause" of his disability, should not stand. Appellant was an employee and there is no requirement, either in the Worker's Compensation statutes or in case law, that an industrial injury be the dominant cause of the disability. By statutory definition, an industrial injury which aggravates a pre-existing medical condition is compensable.

Appellant respectfully prays that the Order of July 28, 1987, be reversed and remanded for an award of permanent total disability compensation.

RESPECTFULLY SUBMITTED this 27th day of January, 1988.

HELGESEN & WATERFALL



JACK C. HELGESEN
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF OF THE APPELLANT, postage prepaid this 27th day of January, 1988 to the following:

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JACK C. HELGESEN

ADDENDUM

Exhibit 1:
U.C.A. 35-1-16

Powers and duties of the commission
- Fees.

Exhibit 2:
U.C.A. 35-1-45

Compensation for industrial accidents to be paid.

Exhibit 3:
U.C.A. 35-1-67

Permanent total disability - Amount of payments - Vocational rehabilitation, Procedure and payments.

Exhibit 4:
U.C.A. 35-1-69

Combined injuries resulting in permanent incapacity - Payment out of Second Injury Fund - Training of employee.

Exhibit 5:
U.C.A. 35-1-82.53

Reconsideration of order of administrative law judge or commission-
Effect of supplemental order of administrative law judge.

Exhibit 6:
U.C.A. 35-1-82.55

Motion for review - Writing required
- Filing.

Exhibit 7:
U.C.A. 35-1-83

Review by Court of Appeals.

35-1-16. Powers and duties of commission -

Fees.

(1) It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority:

(b) to ascertain and fix reasonable standards, and prescribe, modify, and enforce reasonable orders, for the adoption of safety devices, safeguards, and other means or methods of protection, to be as nearly uniform as possible, as necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety, and welfare of employees in employment and places of employment;

35-1-45. Compensation for industrial accidents to be paid.

Every employee mentioned in Section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

1964

35-1-67. Permanent total disability - Amount of payments - Vocational rehabilitation - Procedure and payments.

In cases of permanent total disability the employee shall receive 66 2/3% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under Section 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of 66 2/3% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week

plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68(1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68(1), including those injured prior to March 6, 1949, shall receive not less than \$120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

35-1-69. Combined injuries resulting in permanent incapacity - Payment out of Second Injury Fund - Training of employee.

(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund provided for in Subsection 35-1-68(1), and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating. This combined impairment rating may not exceed 100%.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided in this Subsection (1), and (b) where there is no such aggravation, no award for combined injuries may be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. In determining the impairment thresholds and assessment of liability in favor of the employee and apportionment between the carrier or employer and the Second Injury Fund, the permanent physical impairment attributable to the industrial injury or the pre-existing condition or overall impairment, shall be considered on a whole person uncombined basis. If the pre-existing incapacity referred to in this Subsection (1)(b) previously has been compensated for, in whole or in part, as a permanent partial disability under this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the Second Injury Fund under this paragraph.

If the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the Second Injury Fund as provided for in this section, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made.

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition, whether due to accidental injury, disease, or congenital causes. The Industrial Commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and any amounts remaining to be paid shall be payable out of the Second Injury Fund. Medical expenses shall be paid in the first instance by the employer or its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the industrial injury shall be reimbursed to the employer out of the Second Injury Fund upon written request and verification of amounts so expended.

(2) The commission may increase the weekly compensation rates to be paid out of this special fund. This increase shall be used for the rehabilitation and training of any employee coming under this chapter as may be certified to the commission by the Rehabilitation Department of the State Board of Education as being eligible for rehabilitation and training. There may not be paid out of such special fund for rehabilitation an amount in excess of \$1,000.

35-1-82.53. (Effective through December 31, 1987). Review of order of administrative law judge or commission - Effect of supplemental order of administrative law judge.

(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge or the commission may file a motion for review of such order. Upon the filing of such motion to review his order the administrative law judge may (a) reopen the case and enter a supplemental order after holding such further hearing and receiving such further evidence as he may deem necessary; or (b) amend or modify his prior order by a supplemental order; or (c) refer the entire case to the commission. If the administrative law judge makes a supplemental order, as provided above, it shall be final unless a motion to review the same shall be filed with the commission.

1975

35-1-52.55. (Effective through December 31, 1987). Motion for review - Writing required - Filing.

Every motion for review shall be in writing, and shall specify in detail the particular errors and objections. Such motion must be filed within fifteen days of the date of any order of the administrative law judge or commission unless further time is granted by the administrative law judge or commission within fifteen days, and unless so filed, said order shall become the award of the commission and shall be final.

1975

35-1-83. (Effective through December 31, 1987).

Review by Court of Appeals.

Within 30 days after the commission has given notice of its award, provided a motion was previously filed in accordance with this act for review of the order or supplemental order upon which the award was based, any affected party, including the Division of Finance, may file an action in the Court of Appeals for review and determination of the lawfulness of the award.

1906